AFFIN BANK BHD

v.

WT LOW & NG REALTY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S6-24-2431-2001]
2 JANUARY 2003

CIVIL PROCEDURE: *Judgment and orders - Order for sale - Application to amend order pursuant to amendments in National Land Code - Whether amendments could be allowed under O. 20 rr. 5 or 11 of Rules of the High Court 1980 - Whether application to amend in effect an attempt to change order for sale - Whether application to be granted*

The plaintiff had filed for an originating summons *vide* encl. 1 on 16 July 2001 for an order for sale. The court ('the S6 court') heard the matter and granted the order on 6 December 2001. In between, ie, on 1 December 2001, there were amendments to the National Land Code ('the NLC'), in particular s. 257(1) regarding matters to be dealt with by an order for sale. The plaintiff had failed to amend the originating summons to reflect the changes in the NLC. Consequently, the plaintiff applied to this court *vide* encl. 15 to amend the originating summons and the order for sale granted thereafter.

Held:

[1] The S6 court had heard the originating summons in encl. 1 and granted an order in terms of the prayers sought for – premised and captioned on the exact terms sought by the plaintiff then. As the amendments to the NLC came into effect before the originating summons was heard and before the order for sale was granted, the plaintiff's application in encl. 15 must fail *in limine* because the court was now *functus officio.* (p 678 b-c)

[2] The plaintiff's application in effect sought to change the judgment of S6 court, and not amend it as alleged in that it sought to add additional prayers which were not before the said court then, much less within its contemplation at the time when the order for sale was granted. (p 679 b-c)

[3] Corrections and amendments are allowed to be made under O. 20 rr. 5 or 11 of the Rules of the High Court 1980. However, allowing the plaintiff's application would stretch the limits of applicability of the said provisions. Furthermore, it would fly in the face of the principle of *functus officio*.

In light of the fact that the originating summons had been filed and an order had been made, the plaintiff should not be allowed to take a short cut by retrospectively amending the originating summons to include non-existent prayers in an attempt to give effect to the amendments to the NLC. (p 680 b-c)

[4] The best remedy for the plaintiff would be to set aside the order for sale that was granted by the S6 court. Next, in an attempt to regularise its cause papers in order to reflect the amendments to the NLC, in particular s. 257, the plaintiff should proceed to re-file afresh its originating summons to seek those additional prayers. (p 680 f)

[Application for amendments vide encl. 15 dismissed with costs.]

Case(s) referred to:
Allen v. Sir Alfred McAlphine & Sons Ltd [1968] 2 QB 229 ***(refd)***
Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
Barker v. Purvis [1887] 56 LT 131 ***(refd)***
D v. D [1903] P 144 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 FC ***(refd)***
Krakauer v. Katz [1954] 1 WLR 278 ***(refd)***
Lalchand Nathermal v. Kamaluddin Maamor [1991] 1 CLJ 47; [1991] 1 CLJ (Rep) 654 HC ***(refd)***
Lazard Brothers & Co v. Midland Bank Ltd [1933] AC 296 ***(refd)***
McCaughey v. Stringer [1914] 1 Ir R 7 ***(refd)***
Mohamed Noor Othman & Ors v. Hj Mohamed Ismail Hj Ibrahim & Ors [1988] 3 MLJ 82 ***(refd)***
Pearlman (Veneers) SA (Pty) v. Bernhard Bartels [1954] 1 WLR 1457 ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Preston Banking Co v. Allsuo [1895] 1 Ch 141 ***(refd)***
Re Army and Navy Hotel [1886] 31 Ch D 644 ***(refd)***
SA Andavan v. Registrar of Titles, Negri Sembilan & Ors [1977] 2 MLJ 220 ***(refd)***
Savena Supramaniam Pillay v. Tan Kah Chiat administrator of Tan Kong Liang deceased [1934] MLJ 133 ***(refd)***
Scott v. Scott [1913] AC 417 ***(refd)***
Shipwright v. Clements [1890] 38 WR 746 ***(refd)***
Tak Ming Co v. Yee Sang Metal Suppliers Co [1973] 1 WLR 300 ***(refd)***
Tetlow v. Orela Ltd [1920] 2 Ch 24 ***(refd)***
Thynne v. Thynne [1955] P 272 ***(refd)***

Legislation referred to:
Civil Procedure Code, s. 309
National Land Code, s. 257(1)
Rules of the High Court 1980, O. 20 rr. 5, 11

For the plaintiff - Kathleen Nunis; M/s Shook Lin & Bok
For the defendant - Jayne Koe; M/s Cheah Teh & Su

Reported by M Maheswaran

JUDGMENT

Abdul Malik Ishak J:

Brief Facts

This was the plaintiff's application by way of encl. 15 to amend its originating summons dated and filed on 16 July 2001 as seen in encl. 1 and to amend the order for sale that was granted by the S6 court on 6 December 2001 as seen in encl. 11. The plaintiff's application in encl. 15 was said to be necessitated by the amendments to the National Land Code 1965 ("NLC") – particularly s. 257(1) thereto, which came into effect on 1 December 2001. Clearly, the originating summons in encl. 1 that moved the S6 court to make that order for sale was filed before the amendments to the NLC came into effect. But when the order for sale was granted by the S6 court on 6 December 2001, it was said that the plaintiff had inadvertently failed to amend the originating summons in encl. 1 to reflect the amendments to the NLC.

Must I allow the application in encl. 15? That was the crucial question of the day for me to decide.

To The Heart Of The Matter

The proposed amended originating summons was annexed to encl. 15 and it sought to introduce the following paragraphs:

3. the reserve price for the purpose of the sale be fixed at RM4,900,000.

4. the sale of the said lands be subject to the following conditions:

   a) no bidder shall be allowed to bid in the sale of the said lands unless the bidder possesses the sum equivalent to 10% of the reserve price specified under paragraph 3 above;

   b) the full amount of the purchase price may be paid immediately after the fall of the hammer by the successful bidder to the Plaintiff;

   c) where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder;

      (i) then the 10% deposit sum shall be retained as a deposit until the full purchase price has been paid; and

(ii) the 10% sum shall be credited into the account of the Defendant for the purpose of reducing the amount due to the Plaintiff pending the settlement of the balance of the purchase price;

d) the balance of the purchase price shall be settled within a date not later than 120 days from the date of the sale, such date to be specified and there shall be no extension of the period so specified;

e) where the full purchase price is not settled on or by the date specified in paragraph (d) the 10% deposit sum paid under paragraph (c) above shall be forfeited and disposed of in the manner specified under Section 267A of the National Land Code.

5. all other directions relating to the auction sale be fixed by the Senior Assistant Registrar.

The proposed amended order for sale would also incorporate the above mentioned paragraphs and they were also annexed to encl. 15.

The defendant vigorously opposed the plaintiff's application in encl. 15. Miss Jayne Koe, the learned counsel for the defendant, submitted that the application in encl. 15 was doomed to fail because "it cannot be done as it is not only impossible but it is contrary to the law."

Miss Kathleen Nunis, the learned counsel for the plaintiff, submitted that the plaintiff was not attempting to change the order for sale. She said that the plaintiff was merely amending the order for sale. She pointed out that the plaintiff was not aware of the amendments to the NLC and that encl. 15 was merely to make things right. She submitted that the plaintiff should not be penalised. She emphasised that the defendant did not challenge the originating summons in encl. 1 and the defendant was absent before the S6 court. She stressed that the absence of the defendant in S6 court showed that the defendant was not interested in challenging the originating summons in encl. 1.

I must, at once, say that the proposed amendments as reproduced earlier were quite extensive. It was a total change – in order to reflect the amendments to the NLC. I too must say that the defendant did not receive the originating summons in encl. 1 and so the defendant was not in a position to challenge the same. The averment at para. 7 to the defendant's affidavit in reply at encl. 19 bears out this assertion and for completeness it is now reproduced:

> I further aver that the defendant did not choose 'not to oppose the plaintiff's claim at the time the above originating summons was heard' bearing in mind that the defendant does not have any record of receipt of the purported notice of the plaintiff's originating summons.

Having heard the submissions of the parties at great length, I forthwith dismissed encl. 15 with costs. My reasons will now follow.

The originating summons in encl. 1 was dated 16 July 2001 and it was also filed, as alluded to by me, on the same day. A close scrutiny of the originating summons in encl. 1 would show that it contained specific prayers. The S6 court heard the originating summons in encl. 1 and granted on 6 December 2001 an order in terms of the prayers sought for – premised and captioned on the exact terms as sought by the plaintiff then. As alluded to earlier, the amendments to the NLC came into effect on 1 December 2001 – namely, before originating summons in encl. 1 was heard and before the S6 court granted the order for sale. Thus, in the light of these simple factual matrix, the plaintiff's application in encl. 15 must fail *in limine* because the court was now *functus officio*. The case of *Lalchand Nathermal v. Kamaluddin bin Maamor* [1991] 1 CLJ 47; [1991] 1 CLJ (Rep) 654 serves as a good guideline. In that case, the plaintiff had applied for final judgment against the defendant in terms of his statement of claim as well as costs. On 29 March 1989, while giving arguments in chambers, counsel for the plaintiff informed the senior assistant registrar that he wished to withdraw the alternative claim in prayer (b). Counsel for the defendant objected to this as he agreed with prayer (b) at that time. After adjoining the matter on 29 March 1989 to consider the arguments, the senior assistant registrar on 5 April 1989 decided that there were no further issues to be tried and made an order in terms of prayers (b), (c), (d) and (e) with costs in the cause. On 18 October 1989, the same parties appeared before the same senior assistant registrar to finalise the draft order which could not be agreed upon by both counsel. On that date, counsel for the plaintiff applied to withdraw prayer (b) and requested that the senior assistant registrar amend the order given on 5 April 1989 by substituting prayer (b) with prayer (a). The application was objected to by the defendant but the senior assistant registrar allowed the amendment. Counsel for the defendant argued that the order made on 5 April 1989 was a consent order and should not be simply amended on 18 October 1989. Furthermore, no appeal had been filed by the plaintiff against the order. In allowing the defendant's appeal, Abdul Malek Ahmad J (now FCJ) held that:

(a) the senior assistant registrar was *functus officio* on 5 April 1989 after hearing arguments from all parties and that no appeal was made against the decision of the senior assistant registrar. It was not relevant whether the order of the senior assistant registrar had been prepared or perfected or otherwise at the time he was asked to change, amend or set aside his own order. The senior assistant registrar cannot amend the order made on 5 April 1989 on 18 October 1989.

(b) a distinction must be made between changing a judgment as in this case and amending an order just to give the real effect of a judgment which had been announced.

Likewise here, there was no appeal against the order for sale by the S6 court that was granted on 6 December 2001. Here too, the application in encl. 15 sought to change the judgment of the S6 court and not to amend it as claimed by the plaintiff. Here too, the order for sale by the S6 court had been perfected.

It was argued that the application in encl. 15 was merely to give effect to a judgment which had been announced. With respect, I beg to disagree. The application in encl. 15 was more in the nature of changing the judgment by adding additional prayers which were not before the S6 court then, much less within the contemplation of the S6 court at the time when the order for sale was granted.

The application in encl. 15 was not within the realm of corrections. Corrections are allowed to be made under O. 20 r. 11 of the Rules of the High Court 1980 ("RHC"). That O. 20 r. 11 of the RHC is worded in this manner:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

Even corrections have been made under the inherent powers of the courts as evidenced by the following cases:

(1) *Barker v. Purvis* [1887] 56 LT 131 (where there was an error as to the amount of interest due to the defendant);

(2) *Shipwright v. Clements* [1890] 38 WR 746 (where the court altered an injunction from perpetual to 'during remainder of the term of a lease');

(3) *McCaughey v. Stringer* [1914] 1 Ir. R. 7 (where the court corrected an error of account);

(4) *Tak Ming Co. v. Yee Sang Metal Suppliers Co.* [1973] 1 WLR 300, [1973] 1 All ER 569, PC (where the court included an order for interest on the amount of the judgment recovered);

(5) *Re Army and Navy Hotel* [1886] 31 Ch D 644 (where the court corrected an error in the name of a company in a winding-up order); and

(6) *Armitage v. Parsons* [1908] 2 KB 410 (where the court corrected the judgment for excessive amount of costs).

It would certainly be going too far, in fact, it would stretch the limits of the applicability of O. 20 r. 11 of the RHC if the application in encl. 15 was entertained by me. My inherent powers too cannot extend to an application like encl. 15. I would even venture to hold that the plaintiff cannot rely on O. 20 r. 5 of the RHC in its endeavour to succeed in its application in encl. 15 because that would, firstly, stretch the limits of the applicability of the rule itself and, secondly, it would fly in the face of the principle of *functus officio.* It must be borne in mind that the originating summons in encl. 1 had been heard and the S6 court had given its order accordingly. There can never be the question of taking a short cut by retrospectively amending the originating summons in encl. 1 to include non-existent prayers in an attempt to give effect to the amendments to the NLC. It is useful to recall to mind, at this juncture, the sage words of Ajaib Singh J (as he then was) in the case of *S.A. Andavan v. Registrar Of Titles, Negri Sembilan & Ors* [1977] 2 MLJ 220, 225:

> Litigation is governed by rules of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest.

Put differently, what the plaintiff sought to do by way of encl. 15 was to sidestep the proper rules of procedure in order to arrive at its desired objective. It was something akin to "slipping in additional prayers" to the order of the S6 court in an attempt to regularise matters in line with the amendments to the NLC. This cannot be sanctioned by this court.

I do sympathise with the predicament of the plaintiff. But the law cannot be bent to suit the whims and fancies of the plaintiff. The law must take its natural course. The best remedy for the plaintiff to do would be to set aside the order for sale that was granted by the S6 court on 6 December 2001. Next, in an attempt to regularise its cause papers in order to reflect the amendments to the NLC, particularly s. 257 thereof, the plaintiff should proceed to re-file afresh its originating summons seeking all those additional prayers.

Reverting back to O. 20 r. 11 of the RHC, the plaintiff sought to argue that there were mistakes more in the nature of "clerical mistakes" that arose from "accidental slip or omission". But with respect, looking at the originating summons in encl. 1, the prayers that were itemised therein were the very prayers that the S6 court granted. According to the case of *Preston Banking Co. v. Allsup* [1895] 1 Ch 141, that if the order as drawn correctly expressed the intention then it cannot be corrected under this rule or under the inherent jurisdiction of the court even if the decision of the court was procured by fraud or misrepresentation. The same would be true for the present case. The order of the S6 court dated 6 December 2001 correctly expressed the intention of

the originating summons in encl. 1 and so it cannot be corrected by this court. Fraud or misrepresentation was not even alleged in the present case. Now, since neither fraud nor misrepresentation would justify an amendment then all the more reason that neither the alleged "mistake" or "inadvertence" of the plaintiff's solicitors at the time it obtained the order for sale from the S6 court would warrant the amendment of this magnitude as seen in enclosure 15. In *Savena Supramaniam Pillay v. Tan Kah Chiat administrator of Tan Kong Liang deceased* [1934] MLJ 133, the appellate civil jurisdiction (Huggard CJ, Thorne and Gerahty, JJ) held that once a judgment has been passed and entered, the court has no jurisdiction to amend it under the "slip order" unless there has been an accidental slip in drawing up the judgment, or unless the judgment as drawn up does not correctly state what the court actually decided and intended. Of course, that case was decided in the context of s. 309 of the Civil Procedure Code yet the principles enunciated therein are germane and of great utility in the context of the present case. In that case – referring to the *Savena*'s case, the court decided that the judgment obtained by the plaintiff was merely a personal judgment against the defendant and did not entitle the plaintiff to amend it to that of a judgment against the defendant in his representative capacity. Similarly, in the present case, there was no "clerical error" in the order for sale that was granted by the S6 court as envisaged under O. 20 r. 11 of the RHC in order to form the basis for the plaintiff's application in encl. 15.

The plaintiff urged this court to exercise its inherent jurisdiction and allow encl. 15. In response, I have this to say. Although the inherent jurisdiction of the court may be invoked in an inexhaustible variety of circumstances and situations and may be exercised in different ways, yet there are limits to it. The distinctive feature of the inherent jurisdiction of the court is that it is exercisable by summary process. It is part of the machinery of justice and it may be invoked not only in relation to the parties in pending proceedings but also in relation to anyone, whether that someone is a party or not.

Courts have in the past exercised its inherent jurisdictions in a wide variety of situations. Some examples are certainly apt to cite. Thus, under its inherent jurisdiction, the court may dismiss an action for want of prosecution where the action has been allowed to lie dormant for a long period exceeding even the relevant limitation period (*Krakauer v. Katz* [1954] 1 WLR 278; [1954] 1 All ER 244). The court too may dismiss an action by resorting to its inherent jurisdiction where the court is satisfied that by reason of prolonged or inordinate delay – which is inexcusable, the defendant has suffered or is likely to suffer prejudice or that it is no longer possible to have a fair trial between the parties

(*Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229, CA). Again, the court may, acting under its inherent jurisdiction and at any stage of the proceedings which may even extend to after judgment, proceed to:

(a) vary; and

(b) modify;

its own order so that it could express correctly its own intention and meaning and thereby ensure that the ends of justice are not defeated (*Thynne v. Thynne* [1955] P. 272, CA; and *Pearlman (Veneers) S.A. (Pty) v. Bernhard Bartels* [1954] 1 WLR 1457). Again, under the umbrella of its inherent jurisdiction, the court may order that the case be heard in camera where the interest of justice so require (*D. v. D.* [1903] P. 144; and *Scott v. Scott* [1913] AC 417). Again, acting under its inherent jurisdiction, the court may decline to proceed with the proceedings where the parties are dead or non-existent (*Tetlow v. Orela Ltd* [1920] 2 Ch. 24; and *Lazard Brothers & Co. v. Midland Bank Ltd.* [1933] AC 296).

But, it should be remembered that the court's inherent jurisdiction should only be resorted to when there is a basis for doing so. And that is one of the limits to the court's inherent jurisdiction. Here, in the context of the present case, there are specific provisions in the RHC governing amendments and the plaintiff cannot simply turn a blind eye to them. In this connection, the speech of Syed Agil Barakbah SCJ in *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 CLJ 31; ([1988] 1 CLJ (Rep) 244) SC comes in handy. There his Lordship, at pp. 34-35 (p. 247) of the report, aptly said:

> Has the court any jurisdiction to exercise its inherent powers in the instant case? Order 92 rule 4 RHC provides:
>
> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

It must be recalled that the plaintiff sought, *inter alia*, to amend and include the reserve price of the charged land to be stated in the order for sale. The plaintiff relied on a valuation report dated 18 January 2002 as seen in exh.

"AB1" of encl. 14. In that valuation report, it was stated at p. 1, at item 1.0 that the valuers inspected the property on 15 January 2002. Then at p. 2, at item 2.0 of the valuation report, the write-up reads:

> The date of inspection is taken to be the material date of valuation.

How could the plaintiff rely on the valuation report dated 18 January 2002 to amend the order for sale that was granted by the S6 court on 6 December 2001 so as to reflect the reserve price of the charged land? Surely the reserve price of the charged land on 6 December 2001 would be different from that of 18 January 2002. By no stretch of any imagination can it be said that the valuation report existed at the time when the S6 court granted the order for sale. By no stretch of imagination too can it be said that the "date of valuation of the valuation report" existed at the time when the order for sale was granted by the S6 court. To allow the plaintiff's application in encl. 15 would run counter to basic logic and common sense. Now, applying the doctrine of relation back it would appear that in obtaining the order for sale there was at that time a crystal ball to enable the plaintiff to look into the future at the valuation date and at a valuation which occurred more than 1 1/2 months later. In reality, there was not even a valuation report in existence at the time the order for sale was obtained by the plaintiff to enable it to request for an amendment to insert the relevant figures. The plaintiff's legal advisers should be aware of the amendments to the NLC before the order for sale was obtained. The plaintiff's failure to get its papers right before obtaining the order for sale was rather unfortunate. To say as was said by the plaintiff that the amendments "did not in any way detract from the fact that the order for sale was granted against the defendant" was, to say the least, a rather simplistic approach. It must be borne in mind that if the order for sale that was granted by the S6 court was void for non-compliance with the NLC, then that order for sale was of no effect at all. In such a situation, the defendant was free and was entitled to effectively disregard such an order. This was the very advice of Abdoolcader J in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 FC, when his Lordship delivered the decision of the then Federal Court. At p. 39 of the report, his Lordship Abdoolcader J aptly said:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' *(Birmingham (Churchwardens and Overseers) v. Shaw* [1849] 10 QB 868, 880; 116 ER 329 (at p. 880 per Denman CJ)). In *Barnard v. National Dock Labour Board* [1953] 2 QB 18,

34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton LJ). *Ridge v. Baldwin* [1964] AC 40 is to the same effect.

Plainly, what the plaintiff did through encl. 15 was to amend the order for sale that was granted by the S6 court by a backdoor method. It would be perverse in the extreme to argue that the amendment would not prejudice the defendant. No matter what arguments the plaintiff advance, one thing was certain. That the court should not be asked to act in vain (see the speech of Hashim Yeop A. Sani SCJ in *Mohamed Noor bin Othman & Ors v. Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82, 84). It was simply impossible for the plaintiff's application in encl. 15 to be allowed because the originating summons in encl. 1 had been heard and S6 court had granted the order for sale. It was as simple as that.

For all the reasons adumbrated above, I reiterate that encl. 15 should be dismissed with costs.